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Nos. 95-1478 and 95-1503

In the

Supreme Court of the United States

October Term, 1995

JAY PRINTZ, Sheriff/Coroner Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION SUPPORTING THE PETITIONERS

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25 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Congress has power under Article I, Section 8, of the United States Constitution, consistent the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command state-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. § 922(s)(2), (6)(B), and (C).

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION SUPPORTING THE PETITIONERS

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest.

PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the Tenth Amendment and limitations upon Congress' Article I powers. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *United States v. Lopez*, 514 U.S. ____, 115 S. Ct. 1624 (1995).

Amicus seeks to augment the argument in the petitioner's brief by elucidating the dimensions of the powers reserved to the states under the Tenth Amendment to the United States Constitution. PLF believes that its public policy perspective and litigation experience dealing with state sovereignty issues will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of the Brady Handgun Violence Protection Act (the Brady Act or the Act) (18 U.S.C. § 922(s)), an amendment to the Gun Control Act of 1968. 18 U.S.C. § 922. Specifically, Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the interim provisions of the Act. *Mack v. United*

States, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

In 1993, Congress passed the Brady Act which imposes a waiting period of up to five days for the purchase of a handgun. During this waiting period, the Act requires local law enforcement officials, referred to in the Act as Chief Law Enforcement Officers (CLEOs), to perform background checks of handgun purchasers. 18 U.S.C. § 922(s)(1)(2). These background check provisions are to continue for up to five years while the federal government sets up a national criminal background check system to be maintained by the Department of Justice. 18 U.S.C. § 922(t). These interim provisions require local sheriffs, such as Mack and Printz, to serve as CLEOs, 18 U.S.C. § 922(s)(8), or to face possible criminal penalties. 18 U.S.C. § 924(a)(5). *See also Mack*, 856 F. Supp. at 1379 (holding that the threat of criminal penalties for CLEOs exists "[u]nder the plain meaning of the statute"). If the CLEO determines that the transfer of the handgun would be unlawful, the CLEO must destroy information contained in the background check after 20 days and keep all information resulting from the background check confidential, 18 U.S.C. § 922(s)(6)(B). If the CLEO disapproves the transfer, the purchaser may request an explanation for the determination. The CLEO must provide the explanation within 20 days. 18 U.S.C. § 922(s)(6)(C).

Sheriffs Mack and Printz argued, among other things, that this federal mandate to state and local officials violates the Tenth Amendment. *Mack*, 856 F. Supp. at 1378; *Printz*, 854 F. Supp. at 1506. Both District Courts held that Section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992). *Mack*, 856 F. Supp. at 1381; *Printz*, 854 F. Supp. at 1513.

The Ninth Circuit consolidated appeals from both cases and reversed the judgments of the District Courts. *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995). In finding the Act constitutional, the Ninth Circuit rejected any similarity to *New York*, *supra*. In *New York*, this Court rejected, on Tenth Amendment grounds, the "take title" provision of a federal law that gave the states the choice of regulating the disposal of radioactive waste generated within their states or taking title to the waste. *New York*, 505 U.S. at 175-76. The Ninth Circuit in *Mack* stated: "The Brady Act does not embody a mandate to the 'States' in the sovereign sense discussed in *New York*." *Mack*, 66 F.3d at 1031. "[T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" for which the states will be held politically accountable. *Id.* According to the lower court, "[t]he Brady Act is a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031. The lower court found that the duties imposed by the Act do not implicate sovereign policy-making concerns, but rather address typical law enforcement functions--the Act is "not different from other minor obligations that Congress has imposed on state officials." *Id.*

Dissenting in part, Judge Fernandez argued that the Act presents a starker version of the problem in *New York*. "Rather than ordering the state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly." *Mack*, 66 F.3d at 1035. The dissent warned that the federal government's attempt to command state executives directly poses at least as great a danger to the federal system as the usurpation of state law-making powers struck down in *New York*: "This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they

were mere federal employees. ... The time to stop this journey of a thousand miles is at the first step." *Id.*

Sheriffs Mack and Printz petitioned this Court for a writ of certiorari. Because of a split between circuits concerning the constitutionality of the CLEO provisions, the United States supported the petition.[1] Certiorari was granted by this Court on June 17, 1996.

SUMMARY OF ARGUMENT

In rushing to adopt the popular Brady Handgun Control Act, 18 U.S.C. § 922(s), Congress has contravened the Tenth Amendment by dragooning state law enforcement officers (referred to in the Act as CLEOs) to act as federal agents in implementing federal policy. The interim provisions of the Act require CLEOs to perform background checks of handgun purchasers. These mandatory provisions require CLEOs to devote themselves to the performance of federal duties regardless of what local law enforcement priorities may arise. The Ninth Circuit, in holding the Brady Act constitutional, misinterpreted and misapplied Tenth Amendment doctrine.

It has long been recognized that local law enforcement activities are uniquely central to the concept of state sovereignty and merit the strongest constitutional safeguards against federal infringement. The interim provisions of the

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[1] *Compare Koog v. United States*, 79 F.3d 452, 458-59 (5th Cir. 1996) (striking down the CLEO provisions) with *Frank v. United States*, 78 F.3d 815, 825 (2d Cir. 1996) (upholding the provisions), and *Mack*, 66 F.3d at 1931 (upholding the provisions).

Brady Act implicate the states' interest in criminal law enforcement by requiring CLEOs to enforce a federal program. By creating additional affirmative duties, the interim provisions of the Brady Act displace state law enforcement priorities with federal mandates thereby compromising the states' interest in criminal law enforcement.

The interim provisions of the Brady Act do not fit within the Tenth Amendment framework articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* enunciated a process-based test for determining when states are immune from the imposition of federal burdens pursuant to the Commerce Clause. *Garcia* placed its confidence in the political process to ensure that laws will not unduly burden states. The general applicability of the minimum wage laws at issue in *Garcia* justified this reliance because the wage laws applied to individuals as well as states. The individuals could see that the federal government promulgated the laws and they could hold federal politicians accountable. In contrast, the interim provisions of the Brady Act are not directly applicable to the general citizenry, but apply only to state and local law enforcement officers. The general citizenry, therefore, cannot easily determine the source of the background check requirements administered by CLEOs. The normal operation of the political process is therefore ineffective in restraining the imposition of federal burdens on the states.

The interim provisions of the Brady Act flatly violate the standards of federalism set forth in *New York v. United States*, 505 U.S. 144. *New York* invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. That federal law purportedly provided states the choice of regulating the disposal of radioactive waste generated within their states or taking title

to the waste. *Id.* at 175-76. In a ruling that should have been dispositive of the case at bar, the *New York* Court found this was no choice at all because Congress had commandeered the state's legislative process in violation of the Tenth Amendment. In contrast with the Ninth Circuit which found the *New York* ruling unpersuasive, *Koog v. United States*, 79 F.3d 452, recognized that *New York* controls the outcome of this case.

The interim provisions of the Brady Act impose affirmative duties on CLEOs which are tantamount to the forced state legislation that was prohibited in *New York*. These interim provisions of the Brady Act directly compel the precise manner in which state officials must administer federal regulations, subject to criminal penalties. This federal co-option of local law enforcement mechanisms--even if relatively minor and temporary in nature--violates the letter and spirit of the Tenth Amendment and should not be allowed to stand.

ARGUMENT

THE INTERIM PROVISIONS OF THE BRADY ACT VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

> states, are reserved to the states respectively, or to the people.

Constitution of the United States, Amendment X. The language of the amendment reflects the concern of the drafters that the jurisdiction of the central government should extend "to certain enumerated objects only, and leave ... to the several states a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39* (January 16, 1788) at 194 (J. Madison) (Bantam ed. 1982) (The Federalist Papers). By imposing federal regulatory requirements into a field of inherent state sovereignty, and by impressing state officers to administer federal regulations, the interim provisions of the Brady Act exceed the permissible limits of the federal government's jurisdiction.

A. The Interim Provisions of the Brady Act Impermissibly Interfere with an Inherent Aspect of State Sovereignty

Sheriffs Mack and Printz are local officials with critical state law enforcement duties. By the Brady Act's own definition, they bear the chief law enforcement responsibilities for their respective counties. 18 U.S.C. § 922(s)(8). By creating additional affirmative duties which these state officers would not otherwise be required to undertake, the interim provisions of the Brady Act interfere in the administration of the states' criminal justice systems. Regardless of what local law enforcement priorities may arise, the Brady Act requires these officers to devote themselves to the performance of federal duties.

In ruling that the interim provisions of the Brady Act do not violate the Tenth Amendment, the court below found that these regulations do not implicate "inherently central acts of a sovereign." *Mack*, 66 F.3d at 1031. In fact, however, local law enforcement activities are uniquely central to the concept of state sovereignty, and merit the strongest constitutional safeguards against federal infringement.

This Court has repeatedly recognized criminal law enforcement as being quintessentially a province of state governments. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 245 (1989) ("the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court"); *United States v. Lopez*, 115 S. Ct. at 1631 n.3 ("'States possess primary authority for defining and enforcing the criminal law'"); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (the bulk of authority to legislate on criminal justice is the responsibility of the individual states). Most recently, in *United States v. Lopez*, this Court noted that "[u]nder the theories that the Government presents ... , it is difficult to perceive any limitation on federal power, *even in areas such as criminal law enforcement or education where States historically have been sovereign.*" *Lopez*, 115 S. Ct. at 1632 (emphasis added).

The reservation of sovereignty to the states in the field of criminal justice is so compelling that this Court has held that a restitution obligation imposed as part of a state criminal sentence may not be discharged in federal bankruptcy proceedings, *Kelly v. Robinson*, 479 U.S. 36, 47 (1986); and that the federal courts must generally abstain from enjoining state criminal proceedings, even where a state criminal statute is allegedly unconstitutional. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The principle announced in

Younger has been extended to require federal court abstention where an injunction is sought against state criminal law enforcement bodies. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976), *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

In the case at bar, the interim provisions of the Brady Act implicate the states' interest in criminal law enforcement by displacing state law enforcement priorities with federal mandates, thereby forcing the states to reallocate law enforcement resources from state duties to federal duties. The court below erred in ruling that this interference does not implicate "inherently central" aspects of state sovereignty. Because the nature of the state interest which is compromised by the interim provisions of the Brady Act is unquestionably a power reserved to the states by the Constitution, the provisions at issue conflict with the federal structure protected by the Tenth Amendment.

B. The Interim Provisions of the Brady Act Undermine the Process-Based Protections of Political Accountability Enunciated by This Court in Garcia

The court below upheld the interim provisions of the Brady Act in part by reference to this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528:

> There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws

> of general applicability. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Mack, 66 F.3d at 1029. However, the constitutional issues implicated in this case differ from those in *Garcia* in fundamentally important respects.

In *Garcia*, this Court enunciated a process-based test for determining when states are immune from the imposition of federal burdens pursuant to the Commerce Clause. Rather than examining the governmental *function* at issue (such as law enforcement), the *Garcia* Court focused on the operation of the political process as a limitation on federal excesses:

> Any substantive restraint on the exercise of Commerce Clause powers must find its justification in ... possible failings in the national political process rather than ... a "sacred province of state autonomy."

Garcia, 469 U.S. at 554.

What made this test plausible in *Garcia* was the procedural transparency of the regulations at issue in that case--the extension of federal wage-and-hour legislation to certain state employees.

"Because the wage laws applied directly to individuals, as well as to states, individuals could see that the federal government promulgated the laws and could hold federal politicians accountable." Note, *Constitutional Law--Tenth Amendment--Ninth Circuit Holds Interim Enforcement Provisions of the Brady Bill Constitutional*, 109 Harv. L. Rev. 1833, 1836.

In the decision below, the Ninth Circuit found the interim provisions of the Brady Act to be equivalent to *Garcia's* generally applicable federal legislation, characterizing the challenged measure as "a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031. In fact, however, the Brady Act provisions clearly ***violate*** *Garcia's* process-based Tenth Amendment test.

The interim provisions are not directly applicable to individual citizens, but only to certain state officials. Because voters cannot easily determine the source of the registration requirements administered by Sheriffs Printz and Mack, political accountability breaks down. The normal operation of the political process is therefore ineffective in restraining the imposition of federal burdens such as those at issue in this case. Impressing state officials to administer federal regulations "may create a political curtain between the federal 'actors' who pull the strings and the state 'puppets' who move the arms of the federal government--a situation that tends to render the government unaccountable to the polity."[2] Note, *Constitutional Law*, 109 Harv. L. Rev. at 1838.

The *Garcia* Court placed its confidence in the political process to "ensure[] that laws that unduly burden the States

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[2] Concern for governmental accountability ultimately derives from a concern for individual liberty. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities .... To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. at 181.

will not be promulgated." *Garcia*, 469 U.S. at 556. In the case at bar, however, the provisions at issue are not directly applicable to the general citizenry; moreover, the very nature of the interim provisions of the Brady Act generates confusion as to the political level responsible for the registration requirements. Consequently, the Brady Act provisions cannot be upheld under this Court's *Garcia* doctrine.

C. The Interim Provisions of the Brady Act Compel State Officials to Administer a Federal Regulatory Program in Violation of the Constitutional Standards Set Forth by This Court in New York v. United States

In upholding the interim provisions of the Brady Act, the Court below rejected the guidance of one of this Court's leading Tenth Amendment cases, *New York v. United States*, 505 U.S. 144. In *New York*, this Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, a federal law that gave the states the choice of regulating the disposal of radioactive waste generated within their states or taking title to the waste. 505 U.S. at 175-76. The "take title" provision was invalidated as providing no real choice at all, the Court finding that Congress had commandeered the states' legislative processes in violation of the Tenth Amendment's fundamental norms of federalism. *Id.* at 188. In a ruling that should have been dispositive of the case at bar, this Court concluded that "[t]he Federal Government may not compel the States to enact ***or administer*** a federal regulatory program." *Id.* (emphasis added).

New York has rightly been recognized as dispositive by other lower courts passing on the constitutionality of the

interim provisions of the Brady Act. For example, in *Koog v. United States*, 79 F.3d 452, the Fifth Circuit recognized "that *New York* is central to the question before us." *Id.* at 455. The *Koog* court tracked the analysis of the legislation at issue in *New York* and, concluding that the interim duties imposed on the CLEOs are tantamount to forced state legislation," *Koog*, 79 F.3d at 458, found that the Brady Act's interim provisions violated the Tenth Amendment.

In the proceedings below, however, the Ninth Circuit found this Court's *New York* ruling unpersuasive. The appellate panel found *New York* inapplicable because "[t]he Brady Act does not embody a mandate to the 'States' in the sovereign sense. The Brady Act is a regulatory program aimed at individuals and not the states." *Mack*, 66 F.3d at 1031.

As previously noted, the Ninth Circuit erred in finding local law enforcement administration to lie outside the core aspects of state sovereignty. The second point cited by the Court below--that the challenged measures impact directly on state officers rather than upon the states themselves--hardly takes this case out of the ambit of this Court's *New York* doctrine.

The interim provisions of the Brady Act directly compel the precise manner in which state officers must administer federal regulations, subject to criminal penalties. 18 U.S.C. § 924(a)(5). On their face, these provisions amount to precisely the type of forced administration of federal regulations that was prohibited by this Court in *New York*. Under the plain standards set forth by this Court, the decision below should be reversed and the interim provisions of the Brady Act should be struck down as unconstitutional.

D. If Congress Cannot Require the States to Adopt Handgun Regulations, It Likewise Cannot "Dragoon" State Employees to Administer the Interim Provisions of the Brady Act

The court below recognized that "'a direct order to regulate, standing alone, would ... be beyond the power of Congress.'" *Mack*, 66 F.3d at 1030 (quoting *New York*, 505 U.S. at 176). Nevertheless, the appellate panel upheld the interim provisions of the Brady Act because it found them addressed to "individuals and not the states." *Id.* at 1031. In other words, the court below held that Congress could lawfully impress state employees to administer regulations which it could not lawfully force their employers to adopt.

In dissent, Judge Fernandez clearly identified the error in this reasoning:

> Rather than ordering the state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly.

Mack, 66 F.3d at 1034 (Fernandez, C.J., concurring and dissenting). The challenged provisions of the Brady Act may

in fact pose a *greater* danger to federalism than direct commands to regulate:

> This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees.

Id.

Congress evidently concluded that efficient administration of the Brady Act would be facilitated by impressing into service local law enforcement officials.[3] However, ease or efficiency in implementing federal policy is insufficient justification for federal intrusion on sovereign state operations where it is clear that Congress has no power to force the states to adopt such regulations of their own.

The Ninth Circuit found that the duties imposed by the Act on CLEOs are "not different from other minor obligations that Congress has imposed on state officials." *Mack*, 66 F.3d at 1031. However, the question of whether the obligations imposed by the interim provisions are "minor" is subsidiary to the issue of whether the federal government has jurisdiction to mandate state executives to administer federal regulations for the benefit of the federal government.

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[3] "It is clear that Congress sought to take advantage of the local law enforcement's familiarity with the population when the background check provision was drafted." *Frank v. United States*, 860 F. Supp. 1030, 1039 (D. Vt. 1994).

As one constitutional scholar has put it:

> [N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions--in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

Laurence H. Tribe, *American Constitutional Law*, § 5-20 at 381 (2d ed. 1988).

In the words of Judge Fernandez, "[t]he time to stop this journey of a thousand miles is at the first step." *Mack*, 66 F.3d at 1034 (Fernandez, C.J., concurring and dissenting).

CONCLUSION

In reconciling congressional authority under the commerce power with the constraints of the Tenth Amendment, Justice O'Connor has noted, "[i]t is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). In this case Congress, in rushing to adopt the popular Brady Act, has contravened the Tenth Amendment by dragooning state officials to act as federal agents in implementing federal policy.

The interim provisions of the Brady Act compel state executives to enforce federal regulations, for the benefit of the federal government, in a field of inherent state sovereignty. These provisions are not subject to the normal restraints of the political process relied on by this Court in *Garcia*, and flatly violate the standards of federalism set forth in *New York v. United States*. This federal co-option of local law enforcement mechanisms--even if relatively minor and temporary in nature--violates the letter and spirit of the Tenth Amendment and should not be allowed to stand.

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